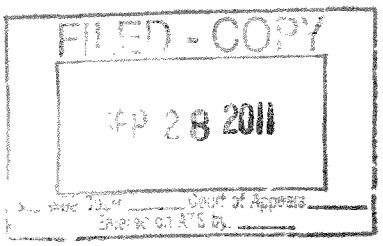
9-28-2011

Brooksby v. Geico General Insurance Co Appellant's Brief Dckt. 38761

IN THE SUPREME COURT OF THE STATE OF IDAHO

CHRISTINA BROOKSBY, Plaintiff/Appellant, vs. GEICO GENERAL INSURANCE COMPANY, Defendant/Respondent.	**Supreme Court Docket No. 38761-2011** (Bonneville County District Court Case No. CV-2010-6403)



APPELLANT'S BRIEF

Appeal from the District Court of the Seventh Judicial District of Idaho
In and for the County of Bonneville

HONORABLE DANE H. WATKINS, JR., DISTRICT JUDGE, PRESIDING

Jordan S. Ipsen (ISB # 7822) **GORDON LAW FIRM, INC.** 477 Shoup Ave, Suite 203 Idaho Falls, ID 83402 Telephone: (208) 552-0467 Facsimile: (866) 886-3419 Attorney for Plaintiff/Appellant CHRISTINA BROOKSBY	Kevin J. Scanlan **HALL, FARLEY, OBERRECHT & BLANTON, P.A.** 702 West Idaho, Suite 700 PO Box 1271 Boise, ID 83701 Attorney for Defendant/Respondent GEICO GENERAL INSURANCE COMPANY

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STATEMENT OF THE CASE

I. NATURE OF THE CASE

This appeal stems from a declaratory judgment action brought pursuant to the Uniform Declaratory Judgment Act, Idaho Code § 10-1201 *et seq.* Brooksby filed the declaratory judgment action against her father's automobile insurer, GEICO General Insurance Company ("GEICO") to resolve a coverage dispute.

II. COURSE OF PROCEEDINGS IN THE TRIAL COURT

The trial court dismissed the case under Rule 12(b)(6) holding that Brooksby lacks standing to bring a declaratory judgment action against her father's automobile insurer.

III. STATEMENT OF FACTS

Christina Brooksby was injured in a single-vehicle automobile collision. (R. at 4.) Christina's father, Craig Brooksby, was driving when he lost control and rolled the vehicle on Interstate 15 in Idaho Falls, Idaho. (R. at 4.) The vehicle rolled, the roof was ripped off, and Christina was ejected from the vehicle. (R. at 4.) She suffered physical injuries that required medical treatment. (R. at 4.) Christina made a claim against her father's insurance carrier, GEICO. (R. at 5.) The claim was denied on the basis that Christina was living with her father at the time of the collision. (R. at 5.) Christina brought a declaratory judgment action against GEICO to resolve the coverage issue. (R. at 5.) The case was dismissed under Rule 12(b)(6) for lack of standing. (R. at 46.)

ISSUES PRESENTED ON APPEAL

Whether the court error in granting GEICO's Motion to Dismiss under Rule 12(b)(6)

when it held that Christina Brooksby lacks standing to bring a declaratory judgment action against GEICO.

STANDARD OF REVIEW

"Whether a party has standing to seek declaratory relief is a question of law which the court of appeals reviews de novo." 22A Am. Jur.2d Declaratory Judgments § 21 (2003). A trial court may not refuse to assume jurisdiction when a declaratory adjudication is appropriate; "if it does enter a dismissal, it will be directed by an appellate tribunal to entertain the action." 22A Am. Jur.2d Declaratory Judgments § 16 (2003).

"Jurisdictional issues, such as standing, and the interpretation of statutory language that confers standing are questions of law over which the Supreme Court exercises free review." *Christian v. Mason*, 148 Idaho 149, 152, 219 P.3d 473, 476 (2009).

A Rule 12(b)(6) motion to dismiss for failure to state a claim, without affidavits or deposition testimony introduced into the record either in support or in opposition, is addressed solely to the sufficiency of the complaint. *Orthman v. Idaho Power Co.*, 126 Idaho 960, 962, 895 P.2d 561, 563 (1995). All inferences from the facts pleaded in the complaint must be drawn in favor of the party opposing the motion; and the issue presented is "whether the plaintiff is entitled to offer evidence to support the claims." *Id.* A motion to dismiss should be granted only if a party can show that there is no genuine issue as to any material fact and that the party is entitled to judgment as a matter of law. *Gibson v. Ada County*, 142 Idaho 746, 751, 133 P.3d 1211, 1216 (2006). On a motion to dismiss, the Court looks only at the pleadings, and all

inferences are viewed in favor of the non-moving party. *Young v. City of Ketchum*, 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002).

ARGUMENT

This case presents for determination the question of whether Christina Brooksby has standing to bring a declaratory judgment action against her father's automobile liability insurer to determine the applicability of a so-called household exclusion clause. This is purely a question of law over which the Idaho Supreme Court reviews de novo. "The Supreme Court reviews questions of law de novo." *Karle v. Visser*, 141 Idaho 804, 806, 118 P.3d 136, 138 (2005).

Legal treatises, other jurisdictions, the Idaho Rules of Civil Procedure, and prior procedural practice in the Idaho Supreme Court all indicate that Brooksby does indeed have standing to maintain the declaratory judgment action.

I. LEGAL TREATISES CONFIRM THAT BROOKSBY HAS STANDING

According to American Jurisprudence Second, it is black letter law that "an injured party may bring a declaratory judgment action against the defendant's insurance carrier to determine if there is policy coverage before obtaining a judgment against defendant in the personal injury action where the defendant's insurer has denied coverage." 22A Am. Jur.2d *Declaratory Judgments* § 138 (2003).

Similarly, *Couch on Insurance* states, "An injured party may seek a declaratory judgment against a liability insurer before the insured tortfeasor's underlying liability has been determined, when the two issues are independent and separable." Steven Plitt et al., *Couch on Insurance*

§232:67, at 232-91 (3d ed. 2000). *See also, e.g.*, Allan D. Windt, *Insurance Claims and Disputes: Representation of Insurance Companies & Insureds* § 8:8, at 8-25 (5th ed. 2007) (stating that just as an insurer may bring a declaratory judgment action against an injured party before that party obtains a favorable judgment, conversely, "the injured party may, despite the absence of a judgment against the insured, be able to bring a declaratory judgment action against the insurance company").

II. OTHER JURISDICTIONS HOLD THAT AN INJURED PARTY HAS STANDING TO BRING A DECLARATORY JUDGMENT ACTION AGAINST THE TORTFEASOR'S INSURANCE CARRIER

The issue of whether an injured party may bring a declaratory judgment action against a tortfeasor's liability insurer appears to be a matter of first impression before this Court. However, other jurisdictions that have explicitly examined this issue have held that an injured party does have standing in such declaratory judgment actions. The Superior Court of Massachusetts in analyzing the issue surveyed the law of various jurisdictions and summarized the results thusly:

> Several courts that have considered whether an injured party may seek declaratory relief against another's insurer have held that an injured party's interest in the tortfeasor's insurance policy is sufficiently present or immediate, once the injury has been sustained, to allow the injured party to seek declaratory relief. E.g., *Miller v. Augusta Mut. Ins. Co.*, 157 Fed. Appx. 632, 637 n.5 (4th Cir. 2005) (unpublished) (noting that Virginia law permits an injured party to bring a declaratory judgment action against the tortfeasor's insurer before obtaining a judgment against the tortfeasor even though it may not bring a direct action against an insurer before judgment has entered); *Bankers Trust Co. v. Old Republic Ins. Co.*, 959 F.2d 677, 682 (7th Cir. 1992) (holding that injured party has a legally protectable interest in tortfeasor's insurance policy after injury but before judgment sufficient to allow claimant to bring an action seeking a declaration that the insurer is liable to indemnify its insured, reasoning: "Must the

> victim go to the expense of prosecuting to judgment a tort suit that will be completely worthless unless the policy is declared valid?"); *Eureka Fed. Savings & Loan Ass'n v. American Cas. Co.*, 873 F.2d 229, 231-32 (9th Cir. 1989) (to conclude that injured party does not have a sufficient immediate and real interest to warrant the issuance of a declaratory judgment would prevent the parties from settling the underlying action prior to a prolonged and costly trial and would undercut California's law obliging the insurer to make a good faith attempt to settle claims); *Howard v. Montgomery Mut. Ins. Co.*, 145 Md. App. 549, 805 A.2d 1167, 1176 (Md.App. 2002) (error to grant summary judgment dismissing declaratory judgment action on ground that tort claimant lacks standing to bring declaratory judgment action against tortfeasor's insurer); *Community Action of Greater Indianapolis, Inc. v. Indiana Farmers Mut. Ins. Co.*, 708 N.E.2d 882, 885 (Ind.Ct.App. 1999) (injured victim has legally protectable interest in policy before reducing tort claim to judgment that supports standing to sue tortfeasor's insurer under Indiana's Declaratory Judgment Act); *National Sec. Fire & Cas. Co. v. Poskey*, 309 Ark. 206, 828 S.W.2d 836, 838 (Ark. 1992) (declaratory judgment action as to insurer's coverage and defense obligations is not barred by law that injured party cannot sue insurer directly before obtaining judgment). Cf. *Maryland Cas. Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273, 61 S. Ct. 510, 85 L. Ed. 826 (1941) (declaratory judgment action by insurer against insured and injured third party stated a claim against injured party because insurer and injured party had "adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment").

Dorchester Mut. Ins. Co. v. Legeyt, 25 Mass. L. Rep. 262 (Mass. Super. Ct. 2008). The Supreme Court of West Virginia has also surveyed rulings from other jurisdictions when it was faced for the first time the issue of whether an injured party has standing to bring a declaratory judgment action against the tortfeasor's insurer. *Christian v. Sizemore*, 383 S.E.2d 810 (W. Va. 1989). It summarized its results as follows:

> Moreover, the result reached by the Supreme Court of Virginia appears to be in accord with decisions in other jurisdictions which permit an injured plaintiff to bring a declaratory judgment action against the defendant's insurance carrier to determine if there is policy coverage before obtaining a judgment against the defendant in the personal injury action where the defendant's insurer has denied coverage.

Id. at 814 (citing several other jurisdictions and American Jurisprudence Second). Another court has explained the rule thusly:

> In a declaratory judgment action, an injured party has standing to establish coverage under a tortfeasor's insurance policy. This is because the injured party's rights to recover any judgment 'clearly are affected by the terms of the policy.' The injured party does not have to obtain a judgment against the tortfeasor before litigating the coverage question. Notably, the *Titan* case held that an injured student had standing to challenge whether the school's insurance policy's 'abuse and molestation exclusion' excluded coverage for his claim and whether an additional insurance policy nonetheless covered his claim. 'Neither [the insurer] nor the [school] apparently felt compelled to seek resolution of the issue, so it was incumbent upon [the student] to pursue the matter.'

Maryland Cas. Co. v. Nestle, 2010 U.S. Dist. LEXIS 98053 at *9-10 (S.D. Miss. Sept. 17, 2010) (internal citations omitted).

> Additionally, courts, when directly confronted with the issue of whether the injured person is a proper party to a declaratory judgment action determining coverage between an insurer and the insured tortfeasor, have permitted such participation.

Sagamore Ins. V. Deming, 2008 Conn. Super. LEXIS 2050, 13-15 (Conn. Super. Ct. Aug. 6, 2008).

> If there is no litigation between the insurance carrier and the insured, as here, the only protection available to the claimant may be the filing a declaratory action himself.
>
> Here, the damage Dial sustained to its property as a result of Eagle's actions provided Dial with standing to bring suit for declaratory relief against Marine. The actual controversy stemmed from the coverage afforded under the insurance policy Marine provided to Eagle. Looking at the facts alleged in the complaint for declaratory judgment, it can be seen that the issues in the complaint are not substantially the same as those in the underlying suit. It is really not contested that Eagle negligently damaged Dial's blowmolding machine. The only issues in the declaratory action are whether Eagle was using a covered vehicle and whether Dial filed this declaratory action in a timely manner. Consequently, collateral

> estoppel is not a concern. Therefore, we hold that, as the injured party, Dial had sufficient standing to enable it to bring a declaratory judgment action and to litigate the question of coverage under the insurance policy.

Dial Corp. v. Marine Office of Am. Corp., 743 N.E.2d 621, 627- (Ill. Ct. App. 2001).

> In our estimation, however, the fact that this is 'consumer' legislation does not prohibit an automobile passenger, whose only connection to the automobile in which he was injured and the insurance policy thereon is his status as a passenger, from having standing to bring a declaratory judgment action against the automobile owner's insurance company for its alleged violation of section 143a-2(3) of the Code. As the Cloninger court pointed out, injured parties should be adequately compensated and should have recourse when they are not.
>
> ... Defendant finally argues that to allow standing to a passenger of an automobile in a declaratory judgment action against an insurance company with whom the passenger had no dealings would allow lawsuits to be filed on the basis of total speculation and for that reason should not be allowed. In our estimation, such a fear does not justify denying plaintiff the opportunity to proceed.

Monroe v. United States Fidelity & Guaranty Co., 603 N.E.2d 855, 858-59 (Ill. Ct. App. 1992). While these decision are not binding on the Court, they were all decided under the Uniform Declaratory Judgment Act. The Uniform Declaratory Judgment Act was designed to "make uniform the law of those states which enact it and to harmonize as far as possible with federal law and regulations on the subject" and thus, "decisions of the highest courts of other states under a like act are precedents by which the court is more or less imperatively bound." 22A Am. Jur.2d *Declaratory Judgments* § 8 (2003).

III. THE DIRECT ACTION RULE DOES NOT PROHIBIT A DECLARATORY JUDGMENT ACTION

GEICO's sole argument to the trial court was that Brooksby's Complaint constitutes an impermissible third-party direct action. (R. at 8.) However, an injured party has standing to

bring a declaratory judgment action against a tortfeasor's insurer despite the fact that the injured party cannot maintain a direct action against the insurer. A declaratory judgment action seeking to resolve a coverage dispute is not a direct action. *See, e.g.*, *Christian v. Sizemore*, 383 S.E.2d 810 (W. Va. 1989).

A third-party direct action is one in which an injured party is seeking to recover the proceeds of an insurance policy belonging to a tortfeasor. *See, e.g.*, 46A C.J.S. *Insurance* § 1407 (1993); *Robinson v. Cabell Huntingon Hosp.*, 498 S.E.2d 27, 31-32 (W. Va. 1997) ("As a general rule in the absence of policy or statutory provisions to the contrary, one who suffers injury which comes within the provisions of a liability insurance policy is not in privity of contract with the insurance company, and cannot reach the proceeds of the policy for the payment of his claim by an action directly against the insurance company.").

Justice Richard Posner writing for the United States Court of Appeals for the Seventh Circuit distinguished a direct action from a declaratory judgment action and ruled on the issue of standing in the following manner:

> This shows that the victim of an insured's tort, even though he is not a third-party beneficiary of his injurer's insurance policy, has a legally protectable interest in that policy before he has reduced his tort claim to judgment (but only after he has been injured). Such an interest is all one needs to bring a dispute that seriously threatens it within the scope of Article III.
>
> **This conclusion is not inconsistent with the refusal of most states to permit the victim of an insured injurer to sue the injurer's liability insurer directly**. The reason for that refusal, a reason wholly unengaged by a case such as this, is to protect the insurance company from the hostility of juries. Anyway Bankers Trust is not suing Old Republic to establish that LKA committed a tort against Bankers Trust, but only to establish that Old Republic's insurance policy remains in force up to the policy limits. Such a suit is not a direct action suit against an insurer.

Bankers Trust Co. v. Old Republic Ins. Co., 959 F.2d 677, 682 (7th Cir. 1992) (internal citations omitted, emphasis added).

State courts have reached the same result. Iowa has a prohibition of direct actions by an injured party against a tortfeasor's insurer with the very limited exemption of when the injured party obtains a judgment against the insured and attempted execution of that judgment against the insured is returned unsatisfied. *See*, Iowa Code § 516.1. In *Unitca Mut. Ins. Co. v. Winmill Int'l*, Inc., 50 F. Supp.2d 871 (N.D. Iowa 1999), the injured party filed a counterclaim in a declaratory judgment action brought by the insurer against the injured party. *Id.* at 872. The insurer moved to dismiss the counterclaim under Rule 12(b)(6) because of the bar on third-party direct actions and the injured party did not qualify for the limited exception to the bar because the injured party had not had execution of a judgment returned unsatisfied or had even obtained a judgment against the insured. *Id.* at 874. The court nevertheless permitted the counterclaim to go forward explaining that a direct action is distinguishable from a declaratory judgment action:

> Thus, the kind of action to which the 'direct action' statute appears to apply is an action for *reimbursement* from the policy; the statute does not, by its plain terms, bar an action for determination of *coverage* under the policy prior to the injured party obtaining a judgment against the insured.
>
> Decisions of the Iowa Supreme Court clarify that the 'direct action' statute *does not* bar an injured party from participation in a declaratory action concerning coverage under the policy.

Id. (emphasis in original). The court emphasized the point even further by stating:

> To make the distinction between a reimbursement action under the 'direct action' statute and a declaratory judgment action concerning coverage even clearer, the Iowa Supreme Court pointed out in *Coover* that although a 'direct action' on the

> part of the injured party had not yet accrued, the injured party was still a proper party to the declaratory judgment action, because there was a justiciable controversy between that party and the insurer that accrued at the time of the injury. This court has not found any decision of an Iowa appellate court specifically authorizing a declaratory judgment action brought by the injured party over assertions of a bar pursuant to § 516.1, but the court nonetheless concludes that the logic of *Coover* and *McCarthy* supports the viability of such a claim.

Id. at 875. In *Christian v. Sizemore,* 383 S.E.2d 810 (W. Va. 1989), the court noted that "[a]n injured plaintiff may not join the defendant's insurance carrier in a suit for damages filed against the defendant arising from a motor vehicle accident, unless the insurance policy or a statute authorizes such a direct action." *Id.* at 812. Despite the fact that the injured party was prohibited from bringing a direct action against the insurer for damages, the court permitted the injured party to bring a declaratory judgment action against the third-party's insurer holding that:

> In this case, however, the plaintiff is not seeking to recover damages against the defendants' insurance carrier. Instead, she seeks a declaration that Kemper is required to provide insurance coverage to the defendants in the personal injury suit. This declaration is entirely ancillary to the personal injury suit for damages against the defendants.
>
> The Uniform Declaratory Judgments Act authorizes courts of record to issue declarations of 'rights, status and other legal relations *whether or not further relief is or could be claimed.*' The purpose of the Act is set forth in W. Va. Code, 55-13-12: 'This article is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered.'
>
> Standing to bring a declaratory judgment action is conferred by [the Uniform Declaratory Judgments Act], on 'any person interested under a deed, will, written contract, or other writings constituting a contract . . . .'

Id. (internal citations and footnotes omitted) (emphasis in original).

In *Reagor v. Travelers Ins. Co.*, 415 N.E.2d 512 (Ill. 1980) the court was faced with the issue of whether an injured party had standing to bring a declaratory judgment action against the tortfeasor's liability insurer. The insurer claimed that the declaratory judgment action "cannot be maintained because it would be contrary to our State's policy of prohibiting direct actions against an insurer before judgment has been rendered against is insured." *Id.* at 515. The court disagreed and held that "plaintiffs' declaratory judgment action cannot be barred on the basis that it is a direct action suit against the insurer." *Id.*

A Rhode Island case that was decided in July of 2011 also held that the direct action rule did not prohibit an injured party from seeking a declaratory judgment against the third-party's insurer. *Berrios v. Jevic Transp., Inc.*, 2011 R.I. Super. LEXIS 97 (R.I. Super. Ct. 2011). The court noted that "[t]he Rhode Island Supreme Court has interpreted this statute to preclude the filing of a 'direct action' for damages against the insurer." *Id.* at *6. Nevertheless, the court went on to hold:

> While Plaintiff is barred from bringing a direct action against First Student's insurers, there is no such bar prohibiting a declaratory action to be filed against National Union. Plaintiff's declaratory judgment action is permitted by law because it is not a 'direct action' against National Union.

Id. at *7. *See also, e.g., Miller v. Augusta Mut. Ins. Co*, 157 Fed. Appx. 632, 637 (4th Cir. 2005) ("While Virginia law prohibits third-parties from bringing direct actions against an insurer before judgment has been entered, the Virginia Supreme Court has permitted (albeit without discussion of the standing question) an injured party to bring a declaratory judgment action against the tortfeasor's insurer before obtaining a judgment against the tortfeasor."); *Martirosov v.*

Shenandoah Flight Servs., 64 Va. Cir. 163, 170 (Va. Cir. Ct. 2004) ("all of the authority... stand[s] for the well accepted principal that a claimant may not sue a tortfeasor's insurance carrier for breach of a duty of good faith or for the violation of a state law against unfair dealing or unfair trade practices. None of the authority supports a broad proposition that a non-insured claimant may never bring a declaratory judgment against a tortfeasor's insurance carrier concerning the limits of coverage.).

IV. THE IDAHO RULES OF CIVIL PROCEDURE DEMONSTRATE THAT BROOKSBY HAS STANDING

Rule 57 states, "In an action seeking declaratory judgment as to coverage under a policy of insurance, any person known to any party to have a claim against the insured relating to the incident that is the subject of the declaratory action shall be joined if feasible." Rule 57(b), I.R.C.P. Not only does Rule 57 denote that an injured party has standing in a declaratory judgment action, it *requires* the injured party to participate in the declaratory judgment action. It is important to note that the rule is not limited to situations where an injured party would be joined as a defendant.

V. THE IDAHO SUPREME COURT HAS ALLOWED DECLARATORY JUDGMENT ACTIONS BY INJURED PARTIES

Although the Idaho Supreme Court has not explicitly ruled on the issue of whether an injured party has standing to initiate a declaratory judgment action against a tortfeasor's insurer, there have been such cases brought before the Court. *See, e.g.*, *Chancler v. American Hardware Mut. Ins. Co.*, 109 Idaho 841, 712 P.2d 542 (1985) (plaintiff injured when crane he bought

collapsed brought declaratory judgment action against crane seller's insurer); *Mutual of Enumclaw v. Harvey*, 115 Idaho 1009, 772 P.2d 216 (1989) (property owner filed counterclaim for declaratory judgment against tortfeasor's insurer to determine applicability of a policy exclusion for intentional conduct in relation to fees and costs taxed against tortfeasor); *Doron Precision Sys. v. United States Fid. & Guar. Co.*, 131 Idaho 680, 963 P.2d 363 (1998) (plaintiff filed declaratory judgment action against insurer of alleged copyright infringer). *Cf. Gillingham Constr., Inc. v. Newby-Wiggins Constr., Inc.*, 142 Idaho 15, 20, 121 P.3d 946, 951 (2005) (co-insureds who were not named parties in the declaratory judgment action could not appeal the result) (citing *Mutual of Enumclaw Ins. Co. v. Pedersen*, 133 Idaho 135, 983 P.2d 208 (1999)).

In facts strikingly similar to the case at bar in *Draper v. Draper*, a wife injured in an automobile collision caused by her husband brought a declaratory judgment action against her husband's liability insurer, State Farm Mutual Automobile Insurance Company. *Draper v. Draper*, 115 Idaho 973, 722 P.2d 180 (1989). The insurer and the tortfeasor did not contest that the injured party had standing. *Id.* In *Draper*, as in *Chancler*, *Harvey*, and *Doron*, neither the trial court nor the Idaho Supreme Court raised the issue of the injured party's standing to bring a declaratory judgment action against the tortfeasor's insurer even though the courts have authority and a duty to determine the issue of standing sua sponte. *See, e.g.*, *Christian v. Mason*, 148 Idaho 149, 151, 219 P.3d 473, 475 (2009) ("The district court, considering the parties' motions for summary judgment, sua sponte raised the issue of standing to bring the action and dismissed the case on that basis...."); *Martirosov v. Shenandoah Flight Servs.*, 64 Va. Cir. 163, 170-71 (Va. Cir. Ct. 2004) ("Although the Supreme Court did not discuss the appropriateness of a declaratory

judgment by a non-insured claimant, it had no trouble granting the declaratory relief requested in this suit. The Supreme Court accepted as appropriate in these circumstances the use of a declaratory judgment action by a claimant to resolve coverage issues. The fact that the parties may not have objected to the proceeding is of no moment because the parties by consent cannot create a justiciable controversy where one does not exist."); *State ex rel. Abraham Linc Corp. v. Bedell*, 602 S.E.2d 542, 554 (W. Va. 2004) (Davis, J., concurring) ("The decisions of this Court and other jurisdictions have pointed out that an appellate court has the inherent authority and duty to *sua sponte* address the issue of standing, even when the parties have failed to raise the issue at the trial court level or during a proceeding before the appellate court...Where neither party to an appeal raises, briefs, or argues a jurisdictional question presented, this Court has the inherent power and duty to determine unilaterally its authority to hear a particular case. Parties cannot confer jurisdiction on this Court directly or indirectly where it is otherwise lacking.").

While the Supreme Court has not explicitly ruled on the issue of standing in declaratory judgment actions brought by an injured party against a tortfeasor's insurer, it has explicitly held that an injured party is a proper party to defend a declaratory judgment action brought by the tortfeasor's insurer against the injured party. *See*, *Temperance Ins. Exch. v. Carver*, 83 Idaho 487, 490, 365 P.2d 824, 826 (1961). "Injured third parties are proper, but not necessary, parties defendant in an action brought by an insurer for a declaratory judgment determining the validity of an insurance policy, and its liability thereunder." *Id.* If an injured party has standing to litigate the validity and scope of a third-party insurer's liability coverage (presumably with the ability to move for summary judgment and assert counterclaims), then surely the injured party has

standing to litigate the exact same issue as a party plaintiff. The legal and factual issues would be identical; the only difference would be which party initiates the action. The tortfeasor's insurer should not have the exclusive ability to initiate the process.

VI. PUBLIC POLICY CONSIDERATIONS DICTATE THAT AN INJURED PARTY HAS STANDING TO FILE A DECLARATORY JUDGMENT ACTION AGAINST THE TORTFEASOR'S INSURER

Courts that have explicitly ruled on the issue of the injured party's standing, have often used, in part, practical considerations to support their decisions. While the law does not always follow the path of common sense, practicality, efficiency, and fairness support a conclusion that an injured party should be permitted to initiate the declaratory judgment action against the tortfeasor's insurer. Justice Richard Posner has eloquently described why such a holding is not only legally sound, but also practically sensible:

> An ironclad rule that the insured's victim can never bring suit against the insurer unless he has a judgment against the insured would be equally inappropriate. For suppose that the day after the accident in which the victim was injured, and therefore long before he could feasibly bring a tort suit, let alone obtain a judgment, the insurer declared the liability insurance policy void; and suppose the insured had no other assets. Then a tort suit would be worthless unless the insured's victim could obtain a declaration that the policy was valid after all. Must the victim go to the expense of prosecuting to judgment a tort suit that will be completely worthless unless the policy is declared valid? Or does not the victim have sufficient interest in the policy to proceed simultaneously, on both fronts, against insured and insurer, or even against the latter first if less preparation is necessary for that suit?

Bankers Trust Co. v. Old Republic Ins. Co., 959 F.2d 677, 681-82 (7th Cir. 1992). Christina Brooksby's situation is the exact scenario that Justice Posner utilized to support his holding that an injured party has standing in a declaratory judgment action against the tortfeasor's insurer.

Christina does not wish to go through the trouble, expense, strain on her family relationships, and harm to her father that would be caused by suing her father only to then learn the judgment against her father is worthless because no insurance coverage exists to satisfy the judgment. Other courts have noted that efficiency, certainty, and a reduction of judicial resources are promoted by permitting the injured party to seek a declaratory judgment against the insurer:

> The Appellate Division, Third and Second Departments, have specifically held that an injured party has standing in a declaratory judgment action. These courts also recognize that the plaintiff in a personal injury action is the person most interested in a dispute for which the declaratory judgment is needed. After a declaratory judgment, the plaintiff is aware of the available coverage of each defendant. Carriers will have an opportunity to fully participate in settlement negotiations with full knowledge of the extent of their responsibility. Individual defendants are informed as to the extent to which their personal assets may be exposed due to a lack of available insurance coverage. All of this promotes settlement negotiations, reduces uncertainty and eliminates unnecessary litigation.

Lee S. Michael & Paul C. Campbell, *1993-94 Survey of New York Law: Tort Law*, 45 Syracue L. Rev. 693, 723-733 (1994).

> We take this opportunity to state that if an insurance company can conduct a declaratory action regarding coverage prior to resolution of an underlying wrongful death trial, then the insureds and third party beneficiaries should be able to raise the coverage question in the underlying lawsuit as well. ... Such reviews of insurance contracts do not involve the jury and are often cursory. ... This procedure simply promotes judicial economy by allowing coverage questions to be resolved at the same time as an underlying lawsuit....

Lewis v. Allstate Ins. Co., 730 So.2d 65, 71 (Miss. 1998).

> Declaratory judgment also provides a prompt means of resolving policy coverage disputes so that the parties may know in advance of the personal injury trial whether coverage exists. This facilitates the possibility of settlements and avoids potential future litigation as to whether the insurer was acting improperly in denying coverage. Moreover, as this case demonstrates, the use of declaratory

> judgment protects the plaintiff from an insured who has no independent assets and is not concerned about insurance coverage.

Christian v. Sizemore, 383 S.E.2d 810, 814 (W. Va. 1989). GEICO should not be permitted to thwart efforts to determine the validity of the liability insurance policy when such a determination would be in the best interests of all the parties involved as well as the courts.

VII. THE TRIAL COURT ERRED BY DISMISSING BROOKSBY'S CASE UNDER RULE 12(b)(6)

The sole issued raised by GIECO and briefed by the parties was whether the direct action rule prohibited Brooksy's declaratory judgment action against GEICO. In granting GEICO's motion to dismiss for failure to state a claim upon which relief can be granted, the trial court relied on two cases, *Selkirk-Priest Basin Ass'n, Inc. v. State ex rel. Andurs*, 127 Idaho 239, 899 P.2d 949 (1995) ("SPBA I") and *Selkirk-Priest Basin Ass'n, Inc. v. State ex rel. Batt*, 128 Idaho 831, 919 P.2d 1032 (1996) ("SPBA II"). Neither of those cases stands for the proposition, or even supports the argument, that the direct action rule prohibits a tort victim from pursing a declaratory judgment action against a tortfeasor's insurer.

In SPBA I, two environmental associations sought to block the sale of timber by the Land Board. *Id.* Because the environmental associations brought suit in their organizational capacities, the Court looked at "principles of organizational standing" to determine whether the environmental associations had standing in their suit. *Selkirk-Priest Basin Ass'n, Inc. v. State ex rel. Andurs*, 127 Idaho 239, 241, 899 P.2d 949, 951 (1995). Under principles of organizational standing, the members of the organization must "face injury" meaning that the Land Board's actions would cause an individualized injury that could be redressed by the court. *Id.* at 242, 899

P.2d at 952. The environmental associations argued, however, that the Uniform Declaratory Judgment Act provided an additional means of standing since their "rights, status or other legal relations are affected by a statue." *Id.* at 245, 899 P.2d at 955. The Supreme Court summarily rejected the argument without analysis stating that it "is without merit." *Id.*

In SPBA II, the environmental associations again sought to block the sale of timber by the Land Board. *Selkirk-Priest Basin Ass'n, Inc. v. State ex rel. Batt*, 128 Idaho 831, 919 P.2d 1032 (1996). The Supreme Court again held for the associations to have standing they must demonstrate "a distinct and palpable injury." *Id.* at 833, 919 P.2d 1034. The environmental groups sought to use the Uniform Declaratory Judgment Act to challenge the constitutionality of certain statutes governing the sale of timber on state land. *Id.* at 834, 919 P.2d 1035. The Court held that to challenge a statute under the Uniform Declaratory Judgment Act, the party must be adversely affected by the statute. *Id.*

SPBA I and II provide little guidance on the issue raised by GEICO, and in fact, the cases were not even cited by GEICO in either of its two legal memoranda. Brooksby is not seeking to challenge the constitutionality of a statute and the principles of associational standing do not apply to her as she is not an association.

The trial court also erred by analogizing SPBA I and II to the case at bar because SPBA I and II were decided under a motion for summary judgment under Rule 56 whereas the issue GEICO raised before the trial court was pursuant to Rule 12(b)(6). Specifically, the trial court erred by holding that, "This Court concludes Christina cannot maintain this action against GEICO without manifesting a 'contractual or statutory provision authorizing the action.'" (R. at

44 citing *Graham v. State Farm Mutual Automobile Insurance Company*, 138 Idaho 611, 613, 67 P.3d 90, 92 (2003).) Since SPBA I and II were decided under Rule 56, the environmental associations were required to come forth with affidavits and evidence demonstrating they had standing.

A court may grant a motion to dismiss for failure to state a claim under Rule 12(b)(6) only "when it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief." *Harper v. Harper*, 122 Idaho 535, 536, 835 P.2d 1346, 1347 (Ct. App. 1992). "[A]s practical matter, a dismissal under Rule 12(b)(6) is likely to be granted only in the unusual case in which the plaintiff includes allegations showing on the face of the complaint that there is some insurmountable bar to relief. *Id.* A motion to dismiss should only be granted when there are "no conceivable set of facts" which would entitle the plaintiff to relief "from the general allegations in the complaint." *Orthman v. Idaho Power Co.*, 126 Idaho 960, 962, 895 P.2d 561, 563 (1995).

By holding that Brooksby's case should be dismissed because she did not "manifest" a "contractual or statutory provision authorizing the action," the trial court looked beyond the pleadings in contravention of Rule 12(b)(6). The relevant insurance contract was not placed before the court and it is a factual determination as to whether any provision in the policy or any circumstances surrounding the automobile collision "authorize the action." Brooksby has alleged that she was injured in automobile collision caused by the negligence of her father, who was insured by GEICO. (R. at 4-5). There is a conceivable set of facts which would entitle Brooksby to have the coverage dispute resolved through a declaratory judgment action. *See, e.g.*,

22A Am. Jur.2d *Declaratory Judgments* § 134 (2003) ("A dispute or controversy between the insurer and insured as to the fact or extent of liability under the policy, including the insured's obligation to defend the insured, is generally held to present an actual or justiciable controversy."); 22A Am. Jur.2d *Declaratory Judgments* § 140 (2003) ("The validity and construction of automobile liability insurance policies are generally appropriate matters to be determined in declaratory judgment actions.").

Finally, the trial court's reliance on *Graham v. State Farm Mutual Automobile Insurance Company*, 138 Idaho 611, 613, 67 P.3d 90, 92 (2003) is misplaced. In *Graham*, the injured party sought damages against the tortfeasor's insurer in a tort action. *Id.* Such an action falls squarely within the direct action rule. However, here, Brooksby is not seeking damages from GEICO nor is she alleging GEICO committed a tort against her, and therefore *Graham* is inapposite.

CONCLUSION

Brooksby requests that this Court overrule the trial court's Judgment Re: Motion to Dismiss and remand the case to the district court for further proceedings since an injured party has standing to bring a declaratory judgment action against a tortfeasor's insurer because such an action does not contravene the direct action rule.

DATED this 23 day of September 2011.

Jordan S. Ipsen

CERTIFICATE OF SERVICE

I hereby certify that on this 26 day of September, 2011, I faxed and caused two (2) true and correct copies of the foregoing instrument to be delivered to the following via U.S. Mail, postage prepaid:

Kevin J. Scanlan
HALL, FARLEY, OBERRECHT & BLANTON, P.A.
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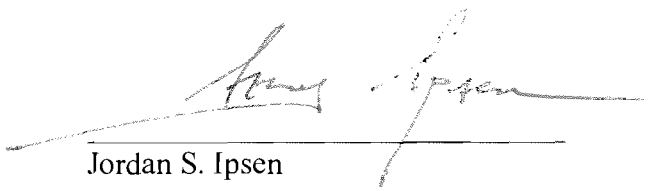

Jordan S. Ipsen